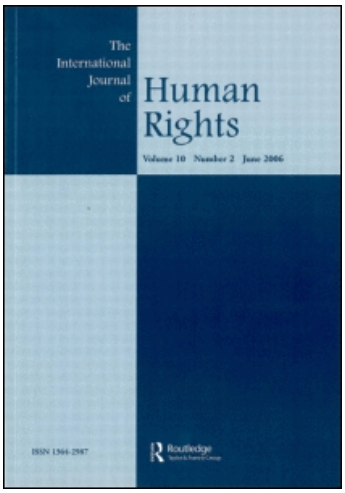

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Keeping up with (which) Joneses: a critique of constitutional comparativism in Hong Kong and its implications for rights development

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This paper explores Hong Kong courts' recourse to foreign and international legal materials in the interpretation of the two most important rights instruments governing Hong Kong, the Basic Law of Hong Kong and the Hong Kong Bill of Rights Ordinance, both generally and in two specific cases concerning freedom of expression and the age of consent for male/male sexual activity. It discusses how Hong Kong courts within the confines of political realities continue to allow themselves to be overridden by foreign courts in matters concerning Hong Kong. Constitutional comparativism as has been practised in Hong Kong, this paper argues, merely serves to allow for and perpetuate unpredictable judicial reasoning and the lingering effects of Hong Kong's colonial past, and is in need of a consistent and reasoned approach for its legitimate application and, ultimately, the protection of human rights, including sexual minority rights, and the rule of law in Hong Kong.

Keywords: Hong Kong; constitutional comparativism; human rights; rule of law; law and development; legitimacy

Introduction

Those outside Hong Kong often wonder whether and how much the political, socio-economic and cultural landscape of Hong Kong has changed since its return to Chinese sovereignty after 155 years of British colonial rule. China's resumption of sovereignty, they generally believe, must have resulted in *some* negative outcomes for Hong Kong, and if Hong Kong had remained under British colonial rule the city would have been better off.

However, what the people of Hong Kong ought to ask is whether they finally have a definitive say, as permitted by the confines of political realities, in matters concerning Hong Kong or in fact continue to allow themselves to be overridden by what other people think is best. As a legal scholar, I must leave the complex task of analysing the political, socio-economic and cultural effects of China's resumption of sovereignty to political scientists, economists, and cultural anthropologists. Instead, this paper explores Hong Kong courts' recourse to foreign and international legal materials in the interpretation of the two most important rights instruments governing Hong Kong: the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (hereinafter referred to as the Basic Law of Hong Kong), promulgated in 1990 by China's National People's Congress as a Chinese national law under Article 31 of the Constitution of the People's Republic of

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China in pursuance of the 1984 Sino-British Joint Declaration,[1] and the Hong Kong Bill of Rights Ordinance, enacted in June 1991 by Hong Kong's colonial legislature in response to the Tiananmen Massacre in Beijing in June 1989. The two rights instruments have since become the core of Hong Kong's public law persona where the development of its own identity and destiny lies.

In his keynote address to the annual meeting of the American Society of International Law in 2003, United States Supreme Court Justice Stephen Breyer referred to his colleague Justice Ruth Ginsburg as she stated extra-judicially that 'comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights'.[2] However, does constitutional comparativism in post-colonial Hong Kong merely serve to allow for and perpetuate the lingering effects of Hong Kong's colonial past? Indeed, Wiktor Osiatynski asks, 'is the continuation of a model of the former colonial power synonymous with borrowing?'[3] As Roger Alford explains, comparative law concerns the central development of a constitutional theory in a particular jurisdiction with comparativism as an interpretive paradigm.[4] 'The legitimacy of constitutional comparativism', Alford argues, 'should be determined by constitutional theory. Comparativism is not a constitutional theory; it is a methodology that is employed depending on a judge's particular theory.'[5]

Thus, this paper first explores the debate within the Hong Kong judiciary (including the Judicial Committee of the Privy Council up to 30 June 1997) on whether, why and how to approach foreign and international legal materials in the interpretation of the Hong Kong Bill of Rights Ordinance (from June 1991) and the Basic Law of Hong Kong (from July 1997). It then examines two specific Hong Kong human rights cases: *Ng Kung Siu* v. *HKSAR*,[6] which concerned the criminalisation of desecration of the Chinese national and Hong Kong regional flags in Hong Kong within the confines of freedom of expression, and *Leung T.C. William Roy* v. *Secretary for Justice*,[7] which concerned the higher age of consent for male/male sexual activity in the light of an individual's right of equality and his right to privacy. The two decisions are chosen as they illustrate how constitutional comparativism as has been practised in Hong Kong may be capable of both undermining and augmenting the protection of fundamental rights and freedoms guaranteed by the Basic Law of Hong Kong and the Ordinance, and in both instances the Hong Kong courts' approaches were problematic. Constitutional comparativism as has been practised in Hong Kong, this paper argues, is in need of a consistent and reasoned approach for its legitimate application and, ultimately, the protection of human rights, including sexual minority rights, and the rule of law in Hong Kong.

Hong Kong courts' general approaches to constitutional comparativism

A constitution, as the *grundnorm* of a polity, ought to be the embodiment of the polity's values, beliefs, and self-identification. As a legally binding instrument consisting of norms antecedent to and governing the polity, a constitution both empowers and constrains the legislative, executive and judicial branches of government. A constitution, furthermore, enshrines and preserves the political compromises leading to its promulgation.

While the Basic Law of Hong Kong was imposed upon Hong Kong under an agreement between the United Kingdom and China and the Hong Kong Bill of Rights Ordinance was enacted by Hong Kong's colonial legislature, the two rights instruments seek to enshrine, guarantee and protect the interests of Hong Kong and its people within the confines of political realities, and a study of constitutional comparativism in Hong Kong will be an

immediate misadventure if it is not informed by an understanding of the two instruments. The Preamble to the Basic Law of Hong Kong, first and foremost, states:

> Upholding national unity and territorial integrity, maintaining the prosperity and stability of Hong Kong, and taking account of its history and realities, the People's Republic of China has decided that upon China's resumption of the exercise of sovereignty over Hong Kong, a Hong Kong Special Administrative Region will be established in accordance with the provisions of Article 31 of the Constitution of the People's Republic of China, and that under the principle of 'one country, two systems', the socialist system and policies will not be practised in Hong Kong.[8]

The substantive provisions of the Basic Law of Hong Kong then provide the following general safeguards for the autonomy of post-colonial Hong Kong:

(1) Hong Kong is authorised 'to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication'.[9]
(2) The socialist system and policies practised in China will not extend to post-colonial Hong Kong, whose 'previous capitalist system and way of life shall remain unchanged for 50 years'.[10]
(3) 'The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.'[11]
(4) In addition to Chinese, English may be used as an official language by the three branches of government in Hong Kong.[12]

In addition, the Basic Law of Hong Kong indicates and guarantees in 18 separate provisions such fundamental rights and freedoms as may continue to be enjoyed in Hong Kong as of 1 July 1997.[13] Article 39 of the Basic Law of Hong Kong, in particular, guarantees the continued application in post-colonial Hong Kong of the International Covenant on Civil and Political Rights (ICCPR),[14] the International Covenant on Economic, Social and Cultural Rights,[15] and International Labour Organisation conventions previously applicable.[16] The Basic Law of Hong Kong also establishes a Hong Kong Court of Final Appeal, replacing the Judicial Committee of the Privy Council as of 1 July 1997 as the court of final resort for Hong Kong.[17] The Hong Kong Court of Final Appeal, which may recruit judges from other common law jurisdictions,[18] is vested with the power of final adjudication.[19] However, in cases involving the interpretation of the Basic Law of Hong Kong concerning 'affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and [Hong Kong], and if such interpretation will affect the judgments on the cases, the courts of [Hong Kong] shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress'.[20]

As will be seen, the debate within the Hong Kong judiciary about the correct approach in the interpretation of the two rights instruments has, however, lain to a lesser extent with the Basic Law of Hong Kong than with the Hong Kong Bill of Rights Ordinance, as the Basic Law of Hong Kong was not in force until 1 July 1997 and the Judicial Committee of the Privy Council, the court of final resort for Hong Kong up to 30 June 1997, played a pivotal role in the debate, which soon became settled as the Hong Kong Court of Final Appeal assumed the role of the Judicial Committee and pronounced its opinion on the matter.

The Hong Kong Bill of Rights Ordinance is the municipal legislation implementing the ICCPR in Hong Kong and its substantive rights provisions are closely modelled upon those of the Covenant. Section 2(3) of the Ordinance stated that in 'interpreting and applying this Ordinance, regard shall be had to the fact that the purpose of this Ordinance is to provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights'.[21] Yash Ghai maintains that the provision was 'undoubtedly an invitation to the judiciary to consider the interpretations of the ICCPR by the Human Rights Committee as well as of other international bodies dealing with analogous provisions. This internationalises the rights issue in a manner which upsets China, which prefers to see rights as determined by the specific historical and economic circumstances of a particular state.'[22] Thus, it was not surprising that section 2(3), together with three other provisions of the Ordinance, was specifically not adopted by the Standing Committee of the National People's Congress on 23 February 1997 as part of the law of Hong Kong as of 1 July 1997 in accordance with Article 160 of the Basic Law of Hong Kong.[23] The reason for the Standing Committee's refusal to adopt the provisions probably lay in China's unease with international human rights law and the ICCPR having an explicit direct effect on the interpretation and application of a domestic law, that is, the Hong Kong Bill of Rights Ordinance and consequently all domestic laws of Hong Kong. Ghai, Peter Wesley-Smith, and Johannes Chan all argue that the Standing Committee's refusal nevertheless had no legal effect on the continuing operation of the ICCPR, as judges may rely on the preamble, long title and substantive provisions of the Ordinance all of which make reference to the ICCPR and its incorporation into the law of Hong Kong.[24] Chan further argues that the repeal of any statutory provision found to be inconsistent with the Ordinance took effect on the commencement of the Ordinance, that is, 8 June 1991, and it matters neither when the impugned statutory provision was enacted nor when the inconsistency was discovered: any such impugned statutory provision cannot be 'laws previously in force in Hong Kong' under Article 8 of the Basic Law of Hong Kong and thus cannot have been adopted as part of the law of Hong Kong as of 1 July 1997.[25]

It must be pointed out, however, that neither the United Kingdom government nor Hong Kong's colonial government desired a bill of rights in Hong Kong but for the Tiananmen Massacre in Beijing in 1989[26] which caused public and foreign investors' confidence in the Hong Kong government and the future of Hong Kong to sink 'to an all-time low'[27] as well as an influx of emigration and outflow of capital from Hong Kong. Meanwhile, the Chinese government opposed a bill of rights in Hong Kong as it considered the Basic Law of Hong Kong to be sufficient to protect the rights the ICCPR guarantees. According to Ghai, 'China interprets the expression as "applied to Hong Kong" [in Article 39 of the Basic Law of Hong Kong] to mean as already provided for under domestic law, a stance which the Chinese claim Britain earlier promoted as a way to persuade it to include the ICCPR in the Joint Declaration.'[28] While the Chinese government refrained from refusing to adopt the Bill *in toto* as part of the law of Hong Kong as of 1 July 1997, it did refuse to adopt certain provisions of the Ordinance which expressly incorporated the ICCPR into the law of Hong Kong, as has been noted.[29]

In any case, did the Hong Kong judiciary take up the invitation Ghai saw before it was too late? In *R.* v. *Sin Yau-ming*,[30] Hong Kong Court of Appeal Vice-President Silke observed that 'the glass through which we view the interpretation of the Hong Kong Bill is a glass provided by the Covenant. We are no longer guided by the ordinary canons of constructions of statutes nor with the dicta of the common law inherent in our training. We must look, in our interpretation of the Hong Kong Bill, at the aims of the Covenant and give "full recognition and effect" to the statement which commences that Covenant.'[31]

His Lordship suggested the sources of law that Hong Kong courts should refer to when interpreting the Ordinance:

> While this court is, in effect, required to make new Hong Kong law relating to the manner of interpretation of the Hong Kong Bill and consequentially the tests to be applied to those laws now existing and, when asked, those laws yet to be enacted, we are not without guidance in our task. This can be derived from decisions taken in common law jurisdictions which contain a constitutionally entrenched Bill of Rights. We can also be guided by decisions of the European Court of Human Rights . . . and the European Human Rights Commission . . . Further, we can bear in mind the comments and decisions of the United Nations Human Rights Committee . . . I would hold none of these to be binding upon us though in so far as they reflect the interpretation of articles in the Covenant, and are directly related to Hong Kong legislation, I would consider them as of the greatest assistance and give to them considerable weight.[32]

The two-stage approach of the Supreme Court of Canada in *R.* v. *Oakes*[33] to interpreting the Canadian Charter of Rights and Freedoms[34] then became the yardstick for Hong Kong courts in their interpretation of the Ordinance when determining if a particular statutory provision conflicted with it. Its impact on Hong Kong jurisprudence warrants that it be quoted in detail:

> Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a *Charter* right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, the party invoking s.1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective – the more severe the deleterious effects of a measure, the more important the objective must be.[35]

Nevertheless, as Ghai notes, while both enshrine and guarantee certain fundamental rights and freedoms, the Ordinance and the Charter also share marked dissimilarity:[36] the Ordinance does not have a general limitation clause, unlike the Charter that contains a notwithstanding clause[37] that the Canadian federal or provincial legislatures may invoke to override a judgment dispositive of the issue. There is also no reference in the Ordinance to a 'free and democratic society' as there is in the Charter[38] from which the Supreme Court of Canada deduced the *Oaks* approach to give effect to the Charter's 'overarching values and purposes',[39] and which, with universal suffrage continuing to be wanting in Hong Kong,[40] simply cannot be analogised to apply in Hong Kong.

The Judicial Committee of the Privy Council, however, took issue with Hong Kong courts referring to foreign and international legal materials (save, of course, English legal materials). In *Attorney General of Hong Kong* v. *Lee Kwong-kut*,[41] Lord Woolf insisted that Hong Kong courts ought to abandon the *Oakes* approach and instead determine the question of inconsistency between a statutory provision and the Hong Kong Bill of Rights Ordinance through literal examination of the statutory provision alone. A too generous approach to the interpretation of the Ordinance, His Lordship surmised, would only lead to injustice:

> While the Hong Kong judiciary should be zealous in upholding an individual's rights under the Hong Kong Bill, it is also necessary to ensure that disputes as to the effect of the Bill are not allowed to get out of hand. The issues involving the Hong Kong Bill should be approached with realism and good sense, and kept in proportion. If this is not done the Bill will become a source of injustice rather than justice and it will be debased in the eyes of the public. In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime. It must be remembered that questions of policy remain primarily the responsibility of the legislature.[42]

Following Lord Woolf's demand for judicial restraint, Hong Kong courts' receptiveness to foreign and international legal materials notably subsided. In *Kwan Kong Company Limited* v. *Town Planning Board*,[43] Hong Kong High Court Justice Waung held that in interpreting the Hong Kong Bill of Rights Ordinance, recourse to foreign and international legal materials ought to be avoided if possible, as 'other domestic and international instruments are the product of very different circumstances and situations',[44] and common law rules of interpretation would suffice:

> From the judgments of *Attorney General* v. *Lee Kwong-Kut* and *Ex parte Lee Kwok Hung*,[45] I can detect the common law asserting its good sense requiring that proper interpretation of the human rights Articles in the Hong Kong Bill of Rights ... be subjected to the common law rules of interpretation with its concentration on the text of the statute rather than by resorting to the complex, uncertain and huge volumes on foreign jurisprudence importing in the guise of 'autonomous meanings' foreign concepts which run contrary to the normal meaning of words under a Hong Kong statute.[46]

Recourse to European Convention on Human Rights (ECHR) jurisprudence, according to Justice Waung, was particularly inappropriate, for '[i]n Hong Kong, with our common law tradition and our special eastern situations, we are not equipped to properly understand, appreciate, analyze, apply or develop this foreign jurisprudence',[47] and 'unless something overwhelming and compelling can be shown in any particular European authority, the Hong Kong Court should very wisely decline to be seduced by the seemingly inexhaustible literature from the European Court of Human Rights'.[48] It should be noted, however, that Justice Waung's view that the Hong Kong Bill of Rights Ordinance was not a quasi-constitutional instrument and should not be given a generous interpretation was rejected on appeal.[49]

Interestingly, in *Ming Pao Newspapers* v. *Attorney General of Hong Kong*[50] which was adjudicated during the same period, both the Hong Kong Court of Appeal and the Judicial Committee of the Privy Council made use of ECHR jurisprudence. In particular, the Judicial Committee invoked the doctrine of margin of appreciation, found only in ECHR jurisprudence, to justify deference to Hong Kong's legislature; Lord Jauncey stated:

> The position is accordingly this. First, the Legislative Council has decided that notwithstanding the provisions of the Bill s.30(1) is necessary to preserve the integrity of investigations into corruption. This is a policy decision that cannot be described as 'so unreasonable as to be outside the State's margin of appreciation' (*James* v. *United Kingdom* (1986) 8 EHRR 123 at 154). Indeed, it appears to their Lordships to be a decision which was eminently sensible and by no means disproportionate to the important objectives sought to be achieved. Secondly, the court with its knowledge of local conditions in Hong Kong has endorsed the decision. In these circumstances their Lordships could see no reason to interfere.[51]

As Chan points out, the Judicial Committee's recourse to the doctrine of margin of appreciation *was* inappropriate, as the doctrine developed in response to the fact that the (currently) 47 Council of Europe members states have among them differing legal, political, economic, social and cultural conditions and their national legislatures should be able to formulate policies without heavy scrutiny by the European Court of Human Rights on which members states confer jurisdiction and powers through ratification of and continued participation in the ECHR.[52] The doctrine 'is not apposite in the domestic context of a particular State'.[53] Furthermore, the margin varies depending on the particular circumstances of the case and the Strasbourg court retains the ultimate supervisory role regarding compatibility with the ECHR[54] by which Hong Kong has never been bound. How such a purely European doctrine can be extrapolated into Hong Kong was left unexplained by the Judicial Committee.

Finally, as it assumed the role of the Judicial Committee in Hong Kong as of 1 July 1997, the Hong Kong Court of Final Appeal pronounced its opinion on whether constitutional comparativism was acceptable in post-colonial Hong Kong in *Tang Siu Man* v. *HKSAR*:[55] Justice Bokhary, while acknowledging that decisions of the House of Lords ceased to have binding authority over Hong Kong courts as of 1 July 1997,[56] stated that if the reasoning of a particular decision of the House was cogent then it ought to be followed, as in order to 'develop our own jurisprudence to greatest advantage, it is appropriate for us to tap the best available wisdom of other jurisdictions'.[57] His Lordship also indicated that decisions from other common law jurisdictions were of persuasive authority as Hong Kong courts adjudicated cases.[58] In *Ng Ka Ling and others* v. *Director of Immigration*,[59] Chief Justice Li stated that the Basic Law of Hong Kong 'is an entrenched constitutional instrument to implement the unique principle of "one country, two systems". As is usual for constitutional instruments, it uses ample and general language. It is a living instrument intended to meet changing needs and circumstances.'[60]

Hong Kong courts' approaches to constitutional comparativism in specific cases

The fact that the Hong Kong Court of Final Appeal has stamped its seal of approval on constitutional comparativism in Hong Kong nevertheless does not resolve the fundamental question of whether Hong Kong courts' recourse to foreign and international legal materials in the interpretation of the Basic Law of Hong Kong and the Hong Kong Bill of Rights Ordinance is consistent, principled and, ultimately, legitimate. In other words, is it possible that Lord Woolf and Justice Waung may have been *correct* in rejecting such recourse in the interpretation of Hong Kong laws?

Most English laws and judicial decisions were adapted or followed in Hong Kong before July 1997. In two separate surveys, Wesley-Smith finds that both between 1974 and 1983 and between 1972 and 1997, approximately 74% of cases cited by Hong Kong courts were English cases while 20% were Hong Kong cases.[61] The signing of the Sino-British Joint Declaration in 1984, the enactment of the Hong Kong Bill of Rights Ordinance in 1991 and the impending handover of sovereignty in 1997 little moved the attitudes of the judiciary and the legal profession on the question of what constituted laws of Hong Kong as they continued to rely heavily on English judicial decisions.[62] Indeed, the practice of following English judicial decisions has since been endorsed by the Hong Kong Court of Final Appeal.[63] Recourse to judicial decisions from Western common law jurisdictions such as Australia, Canada, New Zealand and the United States, as well as decisions of bodies established under an international or regional agreement such as the United Nations Human Rights Committee[64] and the European Court of Human Rights,[65] also has continued.

However, in so doing Hong Kong courts generally do not take cognisance of the circumstances or the *ratio decidendi* of, or the constitutional or legislative framework governing, the particular foreign case and, ultimately, the particular foreign constitution. As South African Constitutional Court Justice Kriegler in *Bernstein* v. *Bester*[66] maintained, '[f]ar too often one sees citation by counsel of, for instance, an American judgment in support of a proposition relating to our Constitution, without any attempt to explain why it is said to be in point. Comparative study is always useful, particularly where Courts in exemplary jurisdictions have grappled with universal issues confronting us. ... But that is a far cry from blithe adoption of alien concepts or inappropriate precedents.'[67] Meanwhile, it is significant that recourse to judicial decisions from common law jurisdictions that are predominantly inhabited by non-Caucasians, such as most of the Caribbean countries, India, Malaysia and Singapore, and the mixed legal system that is South Africa's (whose constitutional jurisprudence is particularly rich and discerning) is rarely seen in a Hong Kong court judgment. In the process, foreign laws and judicial decisions may become part of the law of Hong Kong without going through and satisfying Hong Kong's legislature and legislative procedures (however undemocratic they may be – two wrongs do not make a right), while Chinese national laws in order to become part of the law of Hong Kong must be added to Annex III to the Basic Law of Hong Kong through an elaborate and politically controversial procedure.[68]

Chan has sought to explicate such incoherence on the grounds that foreign legal materials from non-Caucasian common law jurisdictions are inaccessible, unfamiliar to lawyers and judges trained in the common law, and difficult to be extrapolated into Hong Kong's legal system.[69] However, the inaccessibility or unfamiliarity of particular foreign legal materials is not sufficient or normative justification for their exclusion or for Hong Kong courts' incoherent and unprincipled approach, and Caribbean, Indian, Malaysian, Singaporean and South African legal materials are no more inaccessible than those from Australia, Canada, New Zealand and, indeed, England and Wales. Legal materials from the Caribbean countries, India, Malaysia, Singapore and South Africa also are no more unfamiliar to a Hong Kong lawyer or judge than the vast and complex jurisprudence that is the United States', where criminal law and family law, to name but two, are primarily matters for the 50 individual states constrained by specific federal laws and regulations, and where federal constitutional oversight must accord the state constitutions and laws of the 50 states deference if not exclusivity and is available and prescribed only where specific criteria and procedures are met. Lastly, the nature of things dictates that *all* foreign legal materials, including English legal materials, must suffer some difficulty in being extrapolated into another legal system.

Indeed, one must ask, why is it so alarming and adverse to Hong Kong's judicial and political autonomy if and when a provision of the Basic Law of Hong Kong, a Chinese national law that derives authority from Article 31 of the Constitution of the People's Republic of China, is interpreted by the Standing Committee of the National People's Congress – a legislative body of China of which Hong Kong now forms a part – or if and when a Chinese law is adopted in Hong Kong through amendment to Annex III to the Basic Law of Hong Kong, when all the while recourse to foreign and international legal materials, including in particular English judicial decisions, is taken as good wisdom, good practice and general enhancement of Hong Kong's laws and legal system? One may argue that as Hong Kong continues to operate under a common law legal system and with recourse to judicial decisions from other common law jurisdictions being a chief characteristic of the common law tradition, it is only natural that Hong Kong

courts make use of jurisprudence and legal materials from other common law jurisdictions. The argument, however, implies that common law jurisdictions operate as a league or under a general umbrella, which is certainly not the case, and it overlooks a fact of great juridical importance: it is *Hong Kong common law* – common law is devoid of meaning if not aligned with a particular *locus* – under which Hong Kong is governed. It also ought to be noted that the common law legal system, implanted in if not imposed upon Hong Kong by the British, is favourably regarded by the local population, with 'common law' sometimes used as a demonstration slogan and synonym of Hong Kong's autonomy, primarily because China adopts the civil law legal system and anything China adopts *must* be inferior if not simply dangerous. Sin Wai Man and Chu Yiu Wai argue that Hong Kong courts' unquestioned recourse to foreign judicial decisions stems from a desire for 'linkage with the ideal Occident' – ideal in the sense that the laws and judicial reasoning adopted by Western countries must be flawless and must be preferred to those that originate locally – 'portrayed as so important that firstly the application of the standards of the Occident to local situations is viewed as unproblematic, and, secondly, the possibility of the development of a locally based common law is perceived as unimportant'.[70] Hong Kong courts' unquestioned recourse to foreign and international legal materials, this paper argues, is diminutive not only of China's sovereignty over Hong Kong, but also of Hong Kong's autonomy over itself. Indeed, as will be seen, in *Ng Kung Siu* v. *HKSAR*, a case that concerned freedom of expression, the Hong Kong Court of Final Appeal did not hesitate to premise its unanimous and concurring judgments on the basis of judicial decisions, legislation and quasi-legal materials from various civil law jurisdictions ranging from Germany, Italy, Japan, Norway to Portugal, and to completely ignore United States jurisprudence which places freedom of expression in a sacrosanct position in the American legal system and the American psyche.

Thus, constitutional comparativism as has been practised in Hong Kong suffers want of objectivity, consistency and principle, as judges and lawyers rely on their own choosing as to which jurisdictions to make use of in a particular case, and neglect or dismiss those jurisdictions with which they are not familiar or are simply in disagreement. The danger underlying such an approach lies not so much in the courts' incomprehension of or disagreement with foreign jurisdictions, as in the fact that the rule of law itself is thereby placed in a vulnerable position, as judges may now engage in an unpredictable exercise through which they self-select foreign laws and their meanings as part of the law of Hong Kong. Anthony Lester argues that only cases that will directly and most benefit one's arguments should be cited to the court.[71] Such an approach, with respect, derails not only the normative determination of the particular issue and the particular case, but also the normative development of the common law (again, Hong Kong common law) and, ultimately, the rule of law in Hong Kong. As United States Supreme Court Justice Scalia in *Roper* v. *Simmons*[72] maintained, '[t]o invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry.'[73]

This paper now explores how the problem revealed itself in two specific Hong Kong human rights cases, namely, *Ng Kung Siu* v. *HKSAR* and *Leung T.C. William Roy* v. *Secretary for Justice*. The two decisions are chosen as they illustrate how constitutional comparativism as has been practised in Hong Kong may be capable of both undermining and augmenting the protection of fundamental rights and freedoms guaranteed by the Basic Law of Hong Kong and the Hong Kong Bill of Rights Ordinance, and in both instances the Hong Kong courts' approaches were problematic.

Ng Kung Siu v. *HKSAR*

Ng Kung Siu v. *HKSAR* concerned the criminalisation of desecration of the Chinese national and Hong Kong regional flags in Hong Kong notwithstanding freedom of expression. As Raymond Wacks has noted, '[a] country's flag is a potent emblem of its nationhood. It therefore evokes both reverence and, for those who oppose the state's policies, abhorrence. For the latter of course it provides a graphic demonstration of protest. A picture of a burning flag is worth a thousand words – especially on the evening news.'[74] In their political demonstration against the lack of democracy in China and in Hong Kong, the two appellants in the case marked the Chinese national and Hong Kong regional flags with 'shame' prominently in Chinese characters.[75] They were convicted of desecrating the Chinese national flag and the Hong Kong regional flag by publicly and wilfully defiling them, contrary to section 7 of the National Flag and National Emblem Ordinance[76] and section 7 of the Regional Flag and Regional Emblem Ordinance.[77] The appellants, each sentenced to be bound over to keep the peace in his own recognisance for a period of 12 months, appealed their convictions, arguing that the provisions were inconsistent with their freedom of expression guaranteed by Article 19 of the ICCPR[78] and thus with Article 39 of the Basic Law of Hong Kong which guarantees the continued application of the Covenant in post-colonial Hong Kong (arguments on Article 27 of the Basic Law of Hong Kong[79] and Article 16 of the Hong Kong Bill of Rights Ordinance,[80] both of which guarantee freedom of expression as *a Hong Kong freedom*, were nonetheless not raised). The government, in reply, argued that restriction on freedom of expression may be justified for the protection of public order, and that it was in this case. It was noted that no violence occurred in the course of the appellants' political demonstration.[81]

The Hong Kong Court of Appeal allowed their appeals that had been directed from the Hong Kong Court of First Instance. In its brief unanimous judgment, two United States authorities on freedom of expression under the First Amendment to the United States Constitution, *Texas* v. *Johnson*[82] and *United States* v. *Eichman*,[83] where the United States Supreme Court ruled that the criminalisation of desecration of the United States national flag was inconsistent with the First Amendment, were the only judicial authorities referred to, and relied upon, substantively.[84] The court also accepted the argument of the defence that 'none of the leading common law jurisdictions criminalise the defacing of the national flag'.[85]

The Hong Kong Court of Final Appeal unanimously disagreed. The court found that the criminalisation of desecration of the Chinese national and Hong Kong regional flags in Hong Kong 'is not a wide restriction of the freedom of expression. It is a limited one. It bans one mode of expressing whatever the message the person concerned may wish to express, that is the mode of desecrating the flags. It does not interfere with the person's freedom to express the same message by other modes.'[86] (Does freedom of expression not encompass freedom to choose *the* expression and *how*?)

Interestingly, in its unanimous judgment the court entirely cast aside United States jurisprudence in allowing the government's appeal and restoring the convictions of the appellants, despite the sacrosanct importance of freedom of expression in the American legal system which the Hong Kong Court of Appeal had acknowledged. Instead, the court referred only to one foreign decision, an advisory opinion by the Inter-American Court of Human Rights under the American Convention on Human Rights,[87] on the meaning of 'laws' in the context of restrictions on rights and freedoms.[88]

Justice Bokhary in his concurring opinion was less reserved. His Lordship first referred to the Australian High Court decision in *Levy* v. *Victoria*[89] – the circumstances of which

His Lordship admitted were different, as the Australian court ruled that restrictions on the appellant's entry into a duck-shooting area in order to protest against laws permitting the shooting of birds and the illegal shooting of protected species did not contravene freedom of expression – to support his view that the criminalisation of desecration of the Chinese national and Hong Kong regional flags in Hong Kong affected only the mode and not the substance of freedom of expression.[90] His Lordship then addressed the question of which foreign judicial decisions should *not* be followed, and they were, no less, the two United States Supreme Court decisions in *Texas* v. *Johnson* and *United States* v. *Eichman* which the Hong Kong Court of Appeal had found dispositive of the issue and which the Hong Kong Court of Final Appeal in its unanimous judgment entirely ignored. Justice Bokhary found that neither of the American decisions was unanimously decided as each was decided by a bare majority of five to four[91] (which, itself, showed unfamiliarity with United States Supreme Court jurisprudence, that many cases before it were decided by a five-to-four majority). Adamant that laws criminalising desecration of the Chinese national and Hong Kong regional flags in Hong Kong were not incompatible with freedom of expression and the ICCPR, *ipso facto* because many jurisdictions that were signatories to the Covenant also had such laws, His Lordship discerned that instead of the two American authorities, Hong Kong courts should look to decisions 'upholding the constitutionality of laws which protect the national flag and render breaches punishable'.[92] His Lordship found a German decision and an Italian one to be particularly useful, as both Germany and Italy were signatories to the ICCPR and their laws criminalising desecration of the national flag were upheld by Germany's Federal Constitutional Court and Italy's Supreme Court of Cassation, although their relevant contexts, laws or judicial reasoning were not at all examined in Justice Bokhary's concurring opinion.[93] His Lordship indicated that further guidance may be obtained by looking at Norway, '*about which we have been supplied information*'[94] and which, according to His Lordship, had no law criminalising desecration of the Norwegian national flag but one criminalising public insult to foreign flags,[95] which His Lordship found to be the same in Japan.[96] Lastly, His Lordship relied on a letter of the Procurator-General of Portugal on the relevant law of Portugal pointing to criminalisation.[97] His Lordship took comfort in the fact that the Portuguese law '[appeared] to criminalize a considerable number of things which our own flag and emblem protection laws do not criminalize'.[98] Thus, His Lordship concluded, the criminalisation of desecration of the Chinese national and Hong Kong regional flags in Hong Kong was not inconsistent with freedom of expression, particularly as 'the only restriction placed is against the desecration of objects which hardly anyone would dream of desecrating even if there was no law against it'[99] – which was patently untrue, for otherwise there would have been no need for such legislative provisions to be enacted so urgently by the Provisional Legislative Council of Hong Kong, the formation of which was itself a constitutional controversy,[100] or for the prosecutions in question. It is also precisely the meaning of freedom of expression that one may choose to *not* desecrate the Chinese national and Hong Kong regional flags.

Why should Hong Kong laws on a matter that threatened freedom of expression in the infancy of the Hong Kong Special Administrative Region and its ultimate rule by China, a country known to suppress such a freedom, reflect the particular opinions of the Germans, Italians, Norwegians, Japanese and Portuguese, and not the vast and vigorous jurisprudence of the United States? What did the other 180 or so countries have to say about their national flags? Also, it could not have escaped Justice Bokhary's attention that Germany, Italy, Norway, Japan and Portugal are all civil law and not common law jurisdictions. As His Lordship referred to Norway and Japan on their criminalisation of desecration of foreign

flags but not of national flags, Justice Bokhary failed to explain why that was the case. As for the Portuguese law supported by a letter of the Procurator-General of Portugal, the fact that it was more wide-ranging in its criminalisation of desecration of the national flag did not at all answer and was wholly irrelevant to the constitutionality of the criminalisation in Hong Kong. Furthermore, the notion that just because a country is a signatory to the ICCPR its laws must be compatible with it rids violation of an international human rights treaty of its very meaning. Lastly, even if German, Italian, Norwegian, Japanese and Portuguese laws on the matter were compatible with the ICCPR, Hong Kong courts must, and failed to, explain why and how similar Hong Kong laws were equally reconcilable, as symmetry in dissimilar contexts may and does lead to dissimilar outcomes.

Instead of following a handful of foreign laws and judicial decisions (let alone quasi-legal materials) without proper inquiry as to why they were chosen and why others were not, and why and how they might be relevant in justifying the criminalisation of desecration of the Chinese national and Hong Kong regional flags within the confines of freedom of expression in Hong Kong, Hong Kong courts ought to have engaged in their own analysis as to why, as a matter of Hong Kong law, such criminalisation was justified in Hong Kong, particularly given Hong Kong's unique circumstances as a special administrative region of China and, against this context, its legislative and (China's) treaty commitments to freedom of expression. The courts may, indeed must, explain why and how particular foreign and international legal materials may and may not be relevant, and explore whether those particular foreign and international legal materials were indicative of a normative consensus or constituted persuasive reasoning. Finally, the courts ought to have taken the opportunity to elucidate judicially whether and how the ICCPR may continue to have an impact on Hong Kong laws as a result of Article 39 of the Basic Law of Hong Kong which guarantees the continued application of the Covenant in post-colonial Hong Kong.

Leung T.C. William Roy v. *Secretary for Justice*

Leung T.C. William Roy v. *Secretary for Justice* was an application for judicial review challenging the higher age of consent for male/male sexual activity in the light of an individual's right of equality and his right to privacy. The applicant, a 20-year-old man self-identified as a homosexual since puberty, alleged that sections 118C,[101] 118F(2)(a),[102] 118H[103] and 118J(2)(a)[104] of the Crimes Ordinance discriminatorily impinged upon his ability to form and develop a mutually consensual and loving relationship with another man as he was subjected to the threat of criminal prosecution and imprisonment for expressing his affection through sexual intimacy and intercourse.[105] Thus, although hitherto not the subject of any criminal prosecution,[106] the applicant argued that the continuing existence of the four legislative provisions violated his right to privacy under Article 29 of the Basic Law of Hong Kong and Article 14 of the Hong Kong Bill of Rights Ordinance and constituted discrimination against him on grounds of sexual orientation in violation of his right of equality under Article 25 of the Basic Law of Hong Kong and Article 22 of the Ordinance.[107]

After concluding that the act of buggery between males was a form of sexual intercourse[108] and elucidating the equality guarantees in Hong Kong,[109] the Hong Kong Court of First Instance stated that '[t]here can be no doubt that gay men have been historically disadvantaged by being perceived to belong to a group marked by stereotyped capacities. The Nazis, for example, had no difficulty in recognising homosexuals as a class, the status being bestowed in order to degrade them as a class. Much of our human rights jurisprudence today springs from the need to protect against such discrimination.'[110]

The court referred to the views of the United Nations Human Rights Committee in *Toonen* v. *Australia*[111] and the judgment of the European Court of Human Rights in *Salguiero da Silva Mouta* v. *Portugal*, where it was concluded, respectively, that Articles 2(1) and 26 of the ICCPR and Article 14 of the ECHR protected an individual against discrimination on grounds of sexual orientation. The court, thus, held that Article 22 of the Hong Kong Bill of Rights Ordinance similarly protected against discrimination on grounds of sexual orientation.[112] In establishing jurisdiction over the matter, the court took note of the Hong Kong Court of Final Appeal decision in *Ng Ka Ling*, where the highest court stated that as 'a matter of obligation, not of discretion' the judiciary must examine whether a particular legislative provision in Hong Kong alleged to violate a fundamental right or freedom was compatible with the Basic Law of Hong Kong or the Hong Kong Bill of Rights Ordinance and, if not, to have it declared unconstitutional and invalid to the extent of its inconsistency,[113] and referred to Article 35(1) of the Basic Law of Hong Kong which states that 'Hong Kong residents shall have the right to . . . access to the courts . . . for timely protection of their lawful rights and interests . . . and to judicial remedies.'[114] Interestingly, instead of referring to the European Court of Human Rights decision in *Norris* v. *Ireland*[115] as the Hong Kong Court of Appeal subsequently did,[116] the court referred to the decision of the European Court of Justice in *Union de Pequerios Agricultores* v. *Council of the European Union*,[117] alongside a number of English, one Canadian and one South African decisions on the general nature of judicial review,[118] to conclude that the continuing existence of the four legislative provisions under challenge and their continuing effect on the applicant was sufficient to enable him to have the necessary *locus standi* to challenge the provisions and have his application for judicial review entertained.[119]

As the government conceded the unconstitutionality of sections 118F(2)(a), 118H and 118J(2)(a) of the Crimes Ordinance,[120] the court indicated that 'it is important, in my opinion, to have regard not to each of the sections challenged by the applicant in isolation but instead to view them together as a legislative scheme'.[121] In finding that section 118C discriminatorily targeted gay men and infringed their right of equality, the court relied[122] particularly on the Ontario Court of Appeal decision in *R.* v. *M. (C.)*.[123] The Hong Kong court also relied on the European Commission of Human Rights decision in *Sutherland* v. *United Kingdom*[124] (although it mistook the decision as 'a watershed case in the European Community'[125] which should in fact be the Council of Europe) and held that '[d]enying persons of a minority class the right to sexual expression in the only way available to them, even if that way is denied to all, remains discriminatory when persons of a majority class are permitted the right to sexual expression in a way natural to them. During the course of submissions, it was described as "disguised discrimination". It is, I think, an apt description. It is disguised discrimination founded on a single base: sexual orientation.'[126] Thus, the court held, the four provisions of the Crimes Ordinance under challenge constituted grave and continuing interference with the applicant's private life and violated his right of equality.[127] In September 2006, the Hong Kong Court of Appeal unanimously upheld the judgment of the Hong Kong Court of First Instance.[128] The government did not lodge a further appeal to the Hong Kong Court of Final Appeal within the prescribed time limit. However, although invalidated by the courts, the four provisions of the Crimes Ordinance have not yet been repealed by legislature and continue to remain on the statute book.

While it is commendable that both the Hong Kong Court of First Instance and the Hong Kong Court of Appeal embraced constitutional protection of equality in Hong Kong on grounds of sexual orientation, it must be pointed out that while the courts relied on Canadian and European judicial decisions, they failed to take cognisance of the laws and

judicial decisions of more than 100 jurisdictions that condemned consensual same-sex sexual activity (Iran to public hanging and Saudi Arabia to public decapitation). As Alford argues:

> If at its bottom [constitutional comparativism] is a process-oriented approach, it will sacrifice core individual rights for the sake of thoroughgoing comparative methodology. . . . If on the other hand, a comparative theory is at its essence a substantive ideal, it must illuminate the selective nature of that ideal. That is, it must explain why certain universally recognized norms are constitutionally cognizable, while other foreign practices that are less solicitous to individual rights are not. If international norms are the substantive ideal without such distinctions, then a convincing case must be made not only for internalizing those norms to enhance individual rights, but also for internalizing those norms to diminish certain rights that are currently enjoyed at an enhanced level. . .[129]

In particular, as the government referred to the case of Zimbabwe and a decision of the Supreme Court of Zimbabwe to support its argument that the judiciary should defer to the legislature in matters of social policy, the Hong Kong Court of First Instance merely noted that no evidence was laid to demonstrate 'what today – if it can be ascertained – is the prevailing view of the Hong Kong community towards matters of homosexual activity carried out consensually and in private. In a cosmopolitan society like Hong Kong "social norms and values" change, often rapidly.'[130] Was the court suggesting then that if the Hong Kong community did predominantly view homosexuality and sexual minorities along the same lines as Zimbabweans (or, more accurately, what the Zimbabwean government purported to be *the* Zimbabwean view[131]), the applicant's constitutional right of equality and his constitutional right to privacy under the Basic Law of Hong Kong and the Hong Kong Bill of Rights Ordinance should no longer be protected? The court, this paper argues, ought to have explained whether and why, as a matter of Hong Kong law, protection provided for in the Basic Law of Hong Kong and the Hong Kong Bill of Rights Ordinance against discrimination must encompass protection against sexual orientation discrimination irrespective of the views of the Hong Kong general public. Instead, what the court was saying amounted in essence to this: 'We have no idea what Hong Kong people think, and frankly we don't care, as we must agree with the Canadians and Europeans (and ignore the Zimbabweans, who are just not quite the same as us to warrant our attention).'

With English courts out of the picture (the issue was decided by Parliament in Westminster through legislation in 2000 and 2003[132]), why, one ought to ask, should an Ontario appellate court decision (*R.* v. *M. (C.)*), which did not receive subsequent scrutiny by the Supreme Court of Canada, on a provision of the Canadian Charter of Rights and Freedoms which unlike the Hong Kong Bill of Rights Ordinance is not premised upon and does not purport to implement the ICCPR, a European Court of Human Rights decision under the ECHR (*Salguiero da Silva Mouta*) to which Hong Kong was not a party, or a European Commission of Human Rights decision under the ECHR which was subsequently settled out of court (*Sutherland*) carry such influential, in this case determinative, weight in, indeed over, Hong Kong judicial reasoning? Either out of pure overlooking or in order to avoid having to engage in a similar vigorous debate and face similar criticism in terms of comparative methodology, both Hong Kong courts sidestepped a discussion of the United States Supreme Court case of *Lawrence* v. *Texas*[133] decided (by a 6–3 majority) only two years before. In addition, the Hong Kong Court of First Instance's reliance on a decision by the European Court of Justice which is not based on and does not enforce a human rights treaty but a series of treaties aiming solely at European economic integration (even if the European Union has subsequently encompassed a broader political integration 'founded on the principles of liberty, democracy, respect for human rights and fundamental

freedoms, and the rule of law'[134]) – notwithstanding the availability of more suitable authorities such as the European Court of Human Rights decision in *Norris* v. *Ireland* that over almost identical facts and arguments held in favour of jurisdiction – evidenced only too clearly Hong Kong courts' incoherent and unprincipled, if not also uninformed, approach to foreign and international legal materials when interpreting the Basic Law of Hong Kong and the Hong Kong Bill of Rights Ordinance. Last but not least, considering the pervasive disdain in Hong Kong for Chinese laws, for reasons noted above, it was not surprising that neither the Hong Kong Court of First Instance nor the Hong Kong Court of Appeal examined the legal status in China of homosexuality and equality and privacy rights in the context of sexual orientation – which, considering that in China there were no laws at all against homosexuality,[135] might well have been dispositive of the case summarily in favour of the applicant.

Again, instead of blindly following self-selected foreign and international legal materials, the Hong Kong courts ought to have engaged in their own analysis as to why, as a matter of Hong Kong law, protection against discrimination in Hong Kong must encompass protection against sexual orientation discrimination, and why and how particular foreign and international legal materials may and may not be relevant. As part of sound constitutional comparativism and judicial reasoning, the courts must provide reasons, under and in the context of Hong Kong laws, for their reflexive application of laws and judicial decisions of Western countries and their reflexive neglect or dismissal of legal materials from countries such as Zimbabwe. Finally, of course, the courts ought to have explored the disparity between Hong Kong and Chinese laws in respect of consensual male/male sexual activity to discern whether and how colonial laws against an individual on the basis of sexual orientation now stood in post-colonial Hong Kong. As Michael Ramsey maintains, if the ultimate commonality among different jurisdictions lies not in the interpretation of constitutional texts but in the determination of whether criminalisation of or a discriminatory age of consent for consensual same-sex sexual activity is morally and socially justifiable, then 'the intuitive authority of the [European Court of Human Rights], as compared to billions of individuals and entities worldwide that might also have a philosophical opinion on the matter, is greatly diminished. The [European Court of Human Rights], as a court, may be of persuasive source of *legal* reasoning, but it is not necessarily a better moral and social decision maker than the multitude whose opinions we are not invited to study.'[136] The argument that jurisprudence from developing countries carries less value in an affluent and cosmopolitan jurisdiction such as Hong Kong is jurisprudentially unsound, as 'this seems to revive the discredited nineteenth-century concept of "civilized" and "uncivilized" nations, and subconsciously to endorse a Eurocentrism that would be indefensible if argued overtly'.[137] Indeed, without even the most basic civil right of universal suffrage, by which even the government of such a politically and economically unstable jurisdiction as Zimbabwe is formally elected, is Hong Kong really so developed?

Conclusion

This paper does not agree with Lord Woolf's or Justice Waung's wholesale dismissal of constitutional comparativism in the interpretation of the Hong Kong Bill of Rights Ordinance and, by extension, the Basic Law of Hong Kong, as constitutional comparativism has its intrinsic values and advantages. In particular, constitutional comparativism offers Hong Kong courts and jurists, as well as the Hong Kong people and government, informed

reflection on and understanding of Hong Kong laws and society and how post-colonial Hong Kong's legal, political and social systems may proceed.

However, this paper also does not agree with Hong Kong courts' approach hitherto to constitutional comparativism. Indeed, it is a cause for worry that Hong Kong courts' recourse to foreign and international legal materials – in particular their almost automatic application of English judicial decisions – is incoherent and unprincipled. Furthermore, the fact that an English court must now take into account ECHR jurisprudence in its decision when an ECHR right is involved[138] means that a Hong Kong court may on one occasion rely on an English judicial decision because it was enlightened by ECHR jurisprudence and yet on another occasion refuse to follow an English judicial decision because it was tainted by jurisprudence under a treaty by which Hong Kong has never been bound. As a result, Hong Kong laws are rendered unpredictable, and the rule of law in Hong Kong undermined. It is trite to say that '[a] constitutional theory that advances the rule of law promotes legal certainty, efficacy, stability, supremacy, and impartiality.'[139] Richard Posner, a judge of the United States Court of Appeals for the Seventh Circuit, warns extra-judicially of constitutional comparativism as it invites individual judges to 'troll deeply in the world's *corpus juris*' which they may then use to support an essentially politically desired or otherwise pre-determined outcome.[140] Such an approach does not advance the rule of law or protection of fundamental rights and freedoms, for '[a] comparative theory must be able to make the case as to why its preferred set of rights are superior to other sets of rights, and the theory must do so consonant with political democracy and the rule of law.'[141] Otherwise, all sets of rights, depending on the views of particular judges and their choice of foreign authorities, will be at risk, at any time, of disfavour and demise.

Perhaps Hong Kong courts may desire to (be seen to) lay the same kind of emphasis as United States Supreme Court Justice O'Connor did on a 'good impression', that recourse to foreign and international legal materials 'may not only enrich our own country's decisions; it will create that all-important good impression. When [Hong Kong] courts are seen to be cognizant of other judicial systems, our ability to act as a rule-of-law model for other nations [(read: China)] will be enhanced.'[142] While it is understandable that Hong Kong courts may endeavour to show to the Hong Kong people and overseas audiences that, despite the transfer of sovereignty, they remain an independent and enlightened judiciary that observes and guarantees the rule of law in Hong Kong, the irony is that by seeking to give such a 'good impression' through incoherent and unprincipled recourse to foreign and international legal materials, *they* are undermining the rule of law in Hong Kong. While it is equally understandable that Hong Kong courts may endeavour to differentiate Hong Kong's laws and legal system as much as possible from those of China in order to avoid the ultimate amalgamation (including amalgamation in appearance) between Hong Kong and Chinese laws and legal systems, recourse to foreign and international legal materials without proper inquiry and only on the supposed basis that they enlighten Hong Kong laws *simpliciter* is not justified. Such recourse is diminutive not only of China's sovereignty over Hong Kong, but also of Hong Kong's autonomy over itself.

'[T]he most constructive use of comparative constitutional law', Seth Kreimer discerns, 'is not as an alternative store of constitutional software, but a challenge to us to reexamine the resources in our own system.'[143] As Justice O'Connor in the United States Supreme Court case of *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*[144] maintained, '[t]he Court's power lies ... in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands. ... the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled

character is sufficiently plausible to be accepted by the Nation.'[145] As time goes on and as China continues to influence Hong Kong thinking (it would be naïve to think that it is not doing so), Hong Kong courts in the future may well decide to resort to constitutional comparativism *against* protection of fundamental rights and freedoms in Hong Kong – if they have not already done so (as in *Ng Kung Siu*). Constitutional comparativism as has been practised in Hong Kong, thus, 'threatens to undermine the integrity of both constitutional law and comparative law'[146] in Hong Kong.

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Notes

1. Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 29 ILM 1519 (1990), adopted by the Seventh National People's Congress at its Third Session on 4 April 1990 in pursuance of the 1984 Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, 23 ILM 1366 (1984). Article 31 of the Constitution of the People's Republic of China states that '[t]he state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of the specific conditions.'
2. Stephen Breyer, 'Keynote Address', *American Society of International Law Proceedings* 97 (2003): 265, 265, quoting Ruth Bader Ginsburg and Deborah Jones Merritt, 'Affirmative Action: An International Human Rights Dialogue', *Cardozo Law Review* 21 (1999): 253, 282.
3. Wiktor Osiatynski, 'Paradoxes of Constitutional Borrowing', *International Journal of Constitutional Law* 1 (2003): 244, 248.
4. Roger P. Alford, 'In Search of a Theory for Constitutional Comparativism', *UCLA Law Review* 52 (2005): 639, 644.
5. Ibid., 641.
6. [1999] 1 HKLRD 783 (Hong Kong Court of Appeal); [1999] 3 HKLRD 907 (Hong Kong Court of Final Appeal).
7. [2005] 3 HKLRD 657 (Hong Kong Court of First Instance); [2006] 4 HKLRD 211 (Hong Kong Court of Appeal).
8. Basic Law of Hong Kong, Preamble.
9. Ibid., Art. 2.
10. Ibid., Art. 5.
11. Ibid., Art. 8.
12. Ibid., Art. 9.
13. Ibid., Arts 24–41.
14. Adopted and opened for signature, ratification and accession by UN GA Res. 2200A(XXI) of 16 December 1966 and entered into force on 23 March 1976.
15. Adopted and opened for signature, ratification and accession by UN GA Res. 2200A(XXI) of 16 December 1966 and entered into force on 3 January 1976.

16. Article 39 of the Basic Law of Hong Kong states that '[t]he provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.'
17. Ibid., Art. 81.
18. Ibid., Art. 82.
19. Ibid.
20. Ibid., Art. 158.
21. Hong Kong Bill of Rights Ordinance (Cap. 383), s. 2(3).
22. Yash Ghai, 'Sentinels of Liberty or Sheep in Woolf's Clothing? Judicial Politics and the Hong Kong Bill of Rights', *Modern Law Review* 60 (1997): 459, 461.
23. Article 160 of the Basic Law of Hong Kong states that '[u]pon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law. Documents, certificates, contracts, and rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and be recognized and protected by the Hong Kong Special Administrative Region, provided that they do not contravene this Law.' By Decision of the Standing Committee of the National People's Congress on the Treatment of the Laws Previously in Force in Hong Kong in Accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Cap. 2206), adopted at the 24th Session of the Standing Committee of the Eighth National People's Congress on 23 February 1997, the following provisions of the Hong Kong Bill of Rights Ordinance were not adopted as part of the law of the Hong Kong Special Administrative Region as of 1 July 1997:

    Section 2(3): In interpreting and applying this Ordinance, regard shall be had to the fact that the purpose of this Ordinance is to provide for the incorporation into the law of Hong Kong of provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong, and for ancillary and connected matters.

    Section 3(1): All pre-existing legislation that admits of a construction consistent with this Ordinance shall be given such a construction.

    Section 3(2): All pre-existing legislation that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistency, repealed.

    Section 4: All legislation enacted on or after the commencement date shall, to the extent that it admits of such a construction, be constructed so as to be consistent with the International Covenant on Civil and Political Rights as applied to Hong Kong.

24. Yash Ghai, 'The Continuity of Laws and Legal Rights and Obligations in the SAR', *Hong Kong Law Journal* 27 (1997): 136; Peter Wesley-Smith, 'Maintenance of the Bill of Rights', *Hong Kong Law Journal* 27 (1997): 15; Johannes Chan, 'The Status of the Bill of Rights in the Hong Kong Special Administrative Region', *Hong Kong Law Journal* 28 (1998): 152.
25. Chan, 'Status of the Bill of Rights', 152–4.
26. Ghai, 'Sentinels of Liberty or Sheep in Woolf's Clothing?', 460.
27. Norman J. Miners, *The Government and Politics of Hong Kong*, 5th edn (Hong Kong: Oxford University Press, 1991), 27.
28. Ghai, 'Sentinels of Liberty or Sheep in Woolf's Clothing?', 461.
29. See text in note 23 above.
30. [1992] 1 HKCLR 127.
31. Ibid., per Silke V.-P., 141.
32. Ibid.
33. [1986] 1 SCR 103.
34. Canadian Charter of Rights and Freedoms (Part I, Constitution Act 1982, S.C. 1982, c. 79; Canada Act 1982, c. 11 [United Kingdom]).

35. *Oakes*, per Dickson C.J., 138–9.
36. Ghai, 'Sentinels of Liberty or Sheep in Woolf's Clothing?', 468.
37. Section 33 of the Canadian Charter of Rights and Freedoms states that '(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this *Charter*. (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this *Charter* referred to in the declaration. (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier dates as may be specified in the declaration. (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1). (5) Subsection (3) applies in respect of re-enactment made under subsection (4).'
38. Section 1, ibid., states that '[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'
39. David Beatty, 'The Canadian Charter of Rights: Lessons and Laments', *Modern Law Review* 60 (1997): 481, 483.
40. For a discussion of Hong Kong's political autonomy and its struggle for universal suffrage, see Phil C.W. Chan, 'Hong Kong's Political Autonomy and its Continuing Struggle for Universal Suffrage', *Singapore Journal of Legal Studies* (2006): 285.
41. [1993] 3 HKPLR 72.
42. Ibid., per Lord Woolf, 100.
43. [1995] 5 HKPLR 261 (Hong Kong High Court); [1996] 6 HKPLR 237 (Hong Kong Court of Appeal).
44. Ibid., per Waung J., 300 (Hong Kong High Court).
45. *R.* v. *Securities and Futures Commission*, ex parte *Lee Kwok Hung* [1993] 3 HKPLR 39 (Hong Kong Court of Appeal).
46. *Kwan Kong Company Limited*, 300 (Hong Kong High Court).
47. Ibid., 315.
48. Ibid., 316.
49. *Kwan Kong Company Limited*, per Litton V.-P., paras 43–4 (Hong Kong Court of Appeal).
50. [1995] 5 HKPLR 13 (Hong Kong Court of Appeal); [1996] 6 HKPLR 103 (Judicial Committee of the Privy Council).
51. Ibid., per Lord Jauncey, 111–12 (Judicial Committee of the Privy Council).
52. Johannes M.M. Chan, 'Hong Kong's Bill of Rights: Its Reception of and Contribution to International and Comparative Jurisprudence', *International and Comparative Law Quarterly* 47 (1998): 306, 319.
53. Ibid.
54. *Sunday Times* v. *United Kingdom* (1979) 2 EHRR 245.
55. [1998] 1 HKLRD 350.
56. Ibid., per Bokhary P.J., 378.
57. Ibid., 377.
58. Ibid.
59. *Ng Ka Ling (an infant)* v. *Director of Immigration*, *Tsui Kuen Nang* v. *Director of Immigration*, *Director of Immigration* v. *Cheung Lai Wah (an infant)* [1999] 1 HKC 291.
60. Ibid., per Li C.J., 339.
61. Peter Wesley-Smith, 'The Legal System, the Constitution, and the Future of Hong Kong', *Hong Kong Law Journal* 14 (1984): 137; Peter Wesley-Smith, 'The Geographical Sources of Hong Kong Law', *Hong Kong Law Journal* 29 (1999): 1.
62. Wesley-Smith, 'The Geographical Sources of Hong Kong Law', 1.
63. *Tang Siu Man* v. *HKSAR* [1998] 1 HKLRD 350.
64. On the powers and functions of the United Nations Human Rights Committee, see ICCPR, Arts 28–45.
65. Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005), opened for signature on 4 November 1950 and entered into force on 3 September 1953. The Convention was amended by Protocol No. 11 (ETS No. 155) to the Convention, opened for signature on 11 May 1994 and entered into force on 1 November 1998, to the effect that the supervisory mechanism consisting of a European Court of Human Rights and

a European Commission of Human Rights be replaced with a single and permanent European Court of Human Rights. For an account of the theory and practice of the European Convention on Human Rights, see P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3rd edn (The Hague: Kluwer, 1998).

66. 1996 (2) SA 751.
67. Ibid., per Kriegler J., para. 133.
68. See Basic Law of Hong Kong, Art. 18 and Annex III.
69. Chan, 'Hong Kong's Bill of Rights', 309.
70. Sin Wai Man and Chu Yiu Wai, 'Whose Rule of Law? Rethinking (Post-)Colonial Legal Culture in Hong Kong', *Social & Legal Studies* 7 (1998): 143, 151.
71. Anthony Lester, 'Human Rights Advocacy in Practice', in *The Hong Kong Bill of Rights: A Comparative Approach*, ed. Johannes Chan and Yash Ghai (Hong Kong: Butterworths Asia, 1993), 201, 208–10.
72. 125 S Ct 1183 (2005).
73. Ibid., per Scalia J., 1228.
74. Raymond Wacks, 'Our Flagging Rights', *Hong Kong Law Journal* 30 (2000): 1, 1.
75. *Ng Kung Siu*, per Stuart-Moore J.A., 786 (Hong Kong Court of Appeal).
76. Section 7 of the National Flag and National Emblem Ordinance (Cap. 2401) states that '[a] person who desecrates the national flag or national emblem by publicly and wilfully burning, mutilating, scrawling on, defiling or trampling on it commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 3 years.'
77. Section 7 of the Regional Flag and Regional Emblem Ordinance (Cap. 2602) states that '[a] person who desecrates the regional flag or regional emblem by publicly and wilfully burning, mutilating, scrawling on, defiling or trampling on it commits an offence and is liable (a) on conviction on indictment to a fine at level 5 and to imprisonment for 3 years; and (b) on summary conviction to a fine at level 3 and to imprisonment for 1 year.'
78. Article 19(2) of the ICCPR states that '[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.' Freedom of expression, however, may be restricted, as Article 19(3), ibid., states that '[t]he exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (ordre public), or of public health or morals.'
79. Article 27 of the Basic Law of Hong Kong states that 'Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike.'
80. Paragraphs (2) and (3) of Article 16 of the Hong Kong Bill of Rights Ordinance are worded identically to paragraphs (2) and (3) of Article 19 of the ICCPR quoted in note 78 above.
81. *Ng Kung Siu*, per Stuart-Moore J.A., 786 (Hong Kong Court of Appeal).
82. 491 US 397 (1989).
83. 496 US 310 (1990).
84. *Ng Kung Siu*, per Stuart-Moore J.A., 791 (Hong Kong Court of Appeal).
85. Ibid.
86. *Ng Kung Siu*, per Li C.J., 921 (Hong Kong Court of Final Appeal).
87. On the powers and functions of the Inter-American Court of Human Rights based in San José, Costa Rica, see American Convention on Human Rights, signed at San José on 22 November 1969 and entered into force on 18 July 1978, Arts 33(b) and 52–69.
88. *Ng Kung Siu*, per Li C.J., 924–5 (Hong Kong Court of Final Appeal).
89. (1997) 189 CLR 579.
90. *Ng Kung Siu*, per Bokhary P.J., 929–30 (Hong Kong Court of Final Appeal).
91. Ibid., 930.
92. Ibid., 931.
93. Ibid.
94. Ibid. (emphasis added).
95. Ibid.
96. Ibid.

97. Ibid.
98. Ibid., 932.
99. Ibid., 933.
100. For a discussion of the constitutional controversy surrounding the Provisional Legislative Council of Hong Kong, see Johannes M.M. Chan, 'The Jurisdiction and Legality of the Provisional Legislative Council', *Hong Kong Law Journal* 27 (1999): 374.
101. Section 118C of the Crimes Ordinance (Cap. 200) states that '[a] man who (a) commits buggery with a man under the age of 21; or (b) being under the age of 21 commits buggery with another man, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life.'
102. Section 118F(1), ibid., states that '[a] man who commits buggery with another man otherwise than in private shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 5 years.' Section 118F(2) states that '[a]n act which would otherwise be treated for the purposes of this section as being done in private shall not be so treated if done (a) when more than 2 persons take part or are present; or (b) in a lavatory or bathhouse to which the public have or are permitted to have access, whether on payment or otherwise.'
103. Section 118H, ibid., states that '[a] man who (a) commits an act of gross indecency with a man under the age of 21; or (b) being under the age of 21 commits an act of gross indecency with another man, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 2 years.'
104. Section 118J(1), ibid., states that '[a] man who commits an act of gross indecency with another man otherwise than in private shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 2 years.' Section 118J(2) states that '[a]n act which would otherwise be treated for the purposes of this section as being done in private shall not be so treated if done (a) when more than 2 persons take part or are present; or (b) in a lavatory or bathhouse to which the public have or are permitted to have access, whether on payment or otherwise.'
105. *Leung T.C. William Roy*, per Hartmann J., para. 5 (Hong Kong Court of First Instance). For a discussion of the age of consent debates in Hong Kong, see Phil C.W. Chan, 'The Gay Age of Consent in Hong Kong', *Criminal Law Forum* 15 (2004): 273.
106. *Leung T.C. William Roy*, ibid., para. 7.
107. Ibid., para. 8. Article 29 of the Basic Law of Hong Kong states that '[t]he homes and other premises of Hong Kong residents shall be inviolable. Arbitrary or unlawful search of, or intrusion into, a resident's home or other premises shall be prohibited.' Article 14(1) of the Hong Kong Bill of Rights Ordinance states that '[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, home or correspondence, nor to unlawful attacks on his honour and reputation.' Article 14(2), ibid., states that '[e]veryone has the right to the protection of the law against such interference or attacks.'
108. *Leung T.C. William Roy*, ibid., paras 17–20.
109. Ibid., paras 34–42.
110. Ibid., para. 44.
111. 1(3) IHRR 97 (1994).
112. *Leung T.C. William Roy*, per Hartmann J., paras 43–6 (Hong Kong Court of First Instance).
113. *Ng Ka Ling*, per Li C.J., 322.
114. Basic Law of Hong Kong, Art. 35(1).
115. (1991) 13 EHRR 186.
116. *Leung T.C. William Roy*, Ma C.J.H.C., para. 42 (Hong Kong Court of Appeal).
117. [2003] QB 893.
118. *Leung T.C. William Roy*, Hartmann J., paras 62–79 (Hong Kong Court of First Instance)
119. Ibid., paras 58–9.
120. Ibid., para. 12.
121. Ibid., para. 133.
122. Ibid., paras 137–9.
123. (1995) 98 CCC (3d) 481.
124. (1997) 24 EHRR CD22.
125. *Leung T.C. William Roy*, per Hartmann J., para. 142 (Hong Kong Court of First Instance).
126. Ibid., para. 141.
127. Ibid., para. 147.

128. *Leung T.C. William Roy* (Hong Kong Court of Appeal).
129. Alford, 'In Search of a Theory for Constitutional Comparativism', 711–2.
130. *Leung T.C. William Roy*, per Hartmann J., para. 142 (Hong Kong Court of First Instance). For discussions of arguments raised in sexual minority rights debates in Hong Kong, see Phil C.W. Chan, 'The Lack of Sexual Orientation Anti-Discrimination Legislation in Hong Kong: Breach of International and Domestic Legal Obligations', *International Journal of Human Rights* 9, no. 1 (2005): 69; Phil C.W. Chan, 'Same-Sex Marriage/Constitutionalism and their Centrality to Equality Rights in Hong Kong: A Comparative–Socio-Legal Appraisal', *International Journal of Human Rights* 11, nos. 1–2 (2007): 33; Phil C.W. Chan, 'Stonewalling through Schizophrenia: An Anti-Gay Rights Culture in Hong Kong?', *Sexuality & Culture* 12 (2008): 71.
131. For an illustrative discussion of the struggles facing persons belonging to sexual minorities in Zimbabwe, see Oliver Phillips, 'Blackmail in Zimbabwe: Troubling Narratives of Sexuality and Human Rights', *International Journal of Human Rights* 13, nos. 1–2 (2009): 345.
132. Sexual Offences (Amendment) Act 2000 (c. 44), s. 1; Sexual Offences Act 2003 (c. 42), s. 140 and Sch. 7.
133. 539 US 558 (2003). In *Leung T.C. William Roy*, para. 140, the Hong Kong Court of First Instance referred to the *obiter dictum* of Justice O'Connor's concurring opinion (not majority opinion as the Hong Kong court stated) in *Lawrence* v. *Texas* and did not discuss the United States Supreme Court's majority opinion delivered by Justice Kennedy. The Hong Kong Court of Appeal did not at all mention the American case.
134. Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community, *Official Journal of the European Union*, C 321 E/1, 29 December 2006, Art. 6(1).
135. In imperial China homosexuality 'was considered neither a crime nor immoral behaviour': Fang-fu Ruan, 'China', in *Sociolegal Control of Homosexuality: A Multi-Nation Comparison*, ed. Donald J. West and Richard Green (New York: Plenum, 1997), 57, 57. Matthew Harvey Sommer, in *Sex, Law, and Society in Late Imperial China* (Palo Alto, CA: Stanford University Press, 2000), 114, points out that 'it is only in the Qing [dynasty] that lawmakers included such acts in the venerable criminal category of "illicit sexual intercourse" (*jian*)'. In republican China, homosexuality has never been explicitly classified as an offence, with the communist (now socialist-market) government in particular refusing to acknowledge that there are any persons belonging to sexual minorities within its territory. The offence of hooliganism, which the communist/socialist-market Chinese government used to suppress homosexuality alongside political dissent, was repealed in 1997: Ruan, 'China', 63–5.
136. Michael D. Ramsey, 'International Materials and Domestic Rights: Reflections on *Atkins* and *Lawrence*', *American Journal of International Law* 98 (2004): 69, 74 (emphasis in original).
137. Ibid., 81.
138. Human Rights Act 1998 (c. 42), ss. 1–3.
139. Alford, 'In Search of a Theory for Constitutional Comparativism', 708.
140. Richard Posner, 'No Thanks, We Already Have Our Own Laws', *Legal Affairs* (July–August 2004): 40, 42.
141. Alford, 'In Search of a Theory for Constitutional Comparativism', 711.
142. Sandra Day O'Connor, 'Remarks at the Southern Center for International Studies', 28 October 2003, http://www.southerncenter.org/OConnor_transcript.pdf (accessed 25 April 2008). See also Vicki C. Jackson, 'Transnational Discourse, Relational Authority, and the U.S. Courts: Gender Equality', *Loyola of Los Angeles Law Review* 37 (2003): 271, 358–9, where the jurist argues that 'constitutions do not function solely as a charter of self-government, or an expression of unique national identity . . . . Constitutions are thus adopted, and interpreted, not only with an eye to the internal demands of the polity but also with an eye on the stature and position of the nation state in the international arena'.
143. Seth F. Kreimer, 'Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing', *University of Pennsylvania Journal of Constitutional Law* 1 (1999): 640, 650.
144. 505 US 833 (1992).
145. Ibid., per O'Connor J., 865–6.
146. Ramsey, 'International Materials and Domestic Rights', 82.